

A **UOL CREDIT SDN BHD**

v.
DATO' VIJAY KUMAR NATARAJAN

B FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ARIFIN ZAKARIA CJ (MALAYA)
GOPAL SRI RAM FCJ
[CIVIL APPEAL NO: 02-38-2008(W)]
C 25 NOVEMBER 2009

CIVIL PROCEDURE: *Judgments and orders - Setting aside, application for - Order of Federal Court dismissing appeal - Leave to appeal - Whether appeal ought to be reinstated - Procedural unfairness - Rules of the Federal Court 1995, r. 137*

CIVIL PROCEDURE: *Appeal - Leave to appeal - Whether grant of leave upon a question imposed duty on court to answer said question - Defence of leave granted - Whether leave ought not to have been granted*

E This was an application by the applicant/appellant under r. 137 of the Rules of the Federal Court 1995 to review and set aside an earlier decision made in this very case. The appellant, upon failing in the litigation it had with the respondent before the High Court and the Court of Appeal, applied for and obtained leave on 17 September 2008 to appeal to this court on a particular question.
F The respondent subsequently took out a motion to set aside the leave granted and, in the alternative, for leave to adduce further evidence. The appeal and the motion both came on for hearing on 10 March 2009 before a differently constituted panel of this
G court. At that stage, the respondent amended his motion for the main prayer to read as follows: "that this court ought not to answer the question posed on 17 September 2008". The amendment was unopposed and the motion was argued, and at the conclusion of arguments the court dismissed the appeal and
H made the usual consequential orders. The appellant's case was that it was entitled to have the order of 10 March 2009 set aside and the appeal reinstated for hearing.

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Held (dismissing the application with costs)

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Per Gopal Sri Ram FCJ delivering the judgment of the court:

- (1) It is now settled that the grant of leave upon a question does not impose a duty on this court to answer it. It is open to a respondent to contend at the hearing of the merits of an appeal that leave ought not to have been granted in the first place and for the panel hearing the appeal to so rule. In the present case, it was undisputed that there was full argument on the issue of whether leave was rightly granted. There was thus no procedural unfairness at all on that account. The appellant's complaint was that its appeal was never heard. That, on the present state of the authorities, appeared to be irrelevant as an appellant who has obtained leave must be prepared to defend the grant of leave at any subsequent stage. The record here showed that the appellant was called upon to defend the leave it had earlier obtained and that there was full argument on the point. This court was obviously satisfied that leave ought not to have been granted and, therefore, dismissed the appeal. That was not an injustice to the appellant. *Sri Kelangkota-Rakan Engineering JV Sdn Bhd v. Arab-Malaysian Prima Realty Sdn Bhd* (foll); *Badan Peguam Malaysia v. Kerajaan Malaysia* (foll). (paras 4, 5, 6, 7 & 8)

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Bahasa Malaysia Translation Of Headnotes

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Ini adalah permohonan oleh pemohon/perayu di bawah k. 137 Kaedah-kaedah Mahkamah Persekutuan untuk menyemak dan mengenepikan suatu keputusan terdahulu yang dibuat dalam kes semasa. Perayu, setelah gagal dalam litigasinya terhadap responden di hadapan Mahkamah Tinggi dan Mahkamah Rayuan, memohon untuk dan memperolehi kebenaran pada 17 September 2008 untuk merayu ke mahkamah ini mengenai sesuatu soalan tertentu. Responden kemudiannya mengemukakan suatu usul untuk mengenepikan kebenaran yang diberi dan, sebagai alternatif, untuk kebenaran bagi mengemukakan keterangan lanjut. Rayuan dan usul kedua-duanya dihadapkan bagi pembicaraan pada 10 Mac 2009 di hadapan panel mahkamah ini yang terdiri dari hakim-hakim lain. Di peringkat itu, responden meminda usulnya untuk membaca seperti berikut: "bahawa mahkamah ini tidak seharusnya menjawab soalan yang ditanya pada 17 September 2008". Pindaan itu tidak dicabar dan usul itu telah dibicara, dan pada kesudahan hujahan-

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A hujahan mahkamah menolak rayuan itu dan membuat perintah-perintah berbangkit yang biasa. Kes perayu ialah bahawa ia berhak untuk mendapat perintah bertarikh 10 Mac 2009 itu diketepikan dan rayuan itu dihidupkan semula untuk dibicarakan.

B **Diputuskan (menolak permohonan dengan kos)**
Oleh Gopal Sri Ram HMP menyampaikan penghakiman mahkamah:

(1) Ia sekarang telah ditetapkan bahawa pemberian kebenaran mengenai suatu soalan tidak mengenakan satu kewajipan atas mahkamah ini untuk menjawabnya. Ia terbuka bagi seseorang responden untuk mendakwa pada pembicaraan merit-merit sesuatu rayuan bahawa kebenaran tidak sepatutnya diberi pada mulanya dan bagi panel yang mendengar rayuan itu untuk mengarahkan sedemikian. Dalam kes semasa, ia tidak dipertikaikan bahawa terdapat hujahan sepenuhnya atas isu sama ada kebenaran telah diberi dengan betul. Oleh itu, tiada apa-apa ketidakadilan prosedural disebabkan. Aduan perayu ialah bahawa rayuannya tidak dibicara. Itu, atas keadaan semasa autoriti-autoriti, nampaknya tidak relevan kerana seseorang perayu yang telah memperolehi kebenaran mesti bersedia untuk membela pemberian kebenaran itu pada mana-mana peringkat kemudiannya. Rekod di sini menunjukkan bahawa perayu telah dipanggil untuk membela kebenaran yang diperolehinya dan bahawa terdapat hujahan sepenuhnya atas perkara itu. Mahkamah ini jelas berpuas hati bahawa kebenaran tidak sepatutnya diberi dan, oleh yang demikian, menolak rayuan itu. Itu tidak merupakan suatu ketidakadilan terhadap perayu. *Sri Kelangkota-Rakan Engineering JV Sdn Bhd v. Arab-Malaysian Prima Realty Sdn Bhd* (diikuti); *Badan Peguam Malaysia v. Kerajaan Malaysia* (diikuti).

Case(s) referred to:

Badan Peguam Malaysia v. Kerajaan Malaysia [2009] 1 CLJ 833 FC (**fol**)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 CLJ 349 FC (**fol**)

Legislation referred to:

Rules of the Federal Court, r. 137

For the appellant - K Anantham (Preetha Pillai with him); M/s Skrine

I *For the respondent - GK Ganesan (K Vibalanathan with him); M/s Kumar Jaspal Quah & Aishah*

Reported by Suresh Nathan

JUDGMENT**A****Gopal Sri Ram FCJ:**

[1] This is an application said to be made under r. 137 of the Rules of the Federal Court to review and set aside an earlier decision made in this very case. The relevant facts are as follows. The applicant (appellant in the substantive appeal) failed in the litigation it had with the respondent at two levels – before the High Court and the Court of Appeal. It then applied and, on 17 September 2008, obtained leave to appeal to this Court on the following question:

B**C**

Whether when in interpreting a general release and/or a clause in the agreement containing a general release, it is ever permissible in law to take a literal rather than contextual interpretation of the same by ignoring the surrounding circumstances or factual background known to the parties at or before the date of the release.

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[2] On 17 December 2008, the respondent took out a motion to set aside the leave granted and in the alternative for leave to adduce further evidence. It appears from the record of this court that the appeal and the motion both came on for hearing on 10 March 2009 before a differently constituted panel. At that stage, the respondent amended his motion for the main prayer to read as follows:

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that this Court ought not to answer the question posed on 17.9.2008.

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According to the evidence filed before us, the amendment was unopposed and the motion was argued. At the conclusion of arguments, the court dismissed the appeal and made the usual consequential orders. The appellant's case based on these undisputed facts is that it is entitled to have the order of 10 March 2009 set aside and to have the appeal reinstated for hearing.

G**H**

[3] Now, I must confess that when I first read the cause papers I formed the view that the appellant was right in its contention. However, having re-read the papers and the relevant authorities, I am now satisfied beyond a doubt that the initial view I formed was wrong and that this application must be dismissed. My reasons are as follows.

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- A [4] It is now settled that the grant of leave upon a question does not impose a duty on this court to answer it. Put differently, there is no legitimate expectation in an appellant by the mere grant of leave that the question posed will be answered. There are several cases that make this plain. But I find it sufficient to quote
B merely from one of them.

[5] In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 CLJ 349, Abdul Malek Ahmad FCJ put the point in plain terms:

- C The common feature in the *Capital Berhad's* case (*supra*) (*Capital Insurance Bhd v. Asiah Abdul Manap & Anor* [2000] 4 CLJ 1), the *Raphael Pura* case (*supra*) (*Raphael Pura v. Insas Bhd & Anor* [2003] 1 CLJ 61) and *The Minister for Human Resources' case* (*supra*) (*The Minister for Human Resources v. Thong Chin Yoong And Another Appeal* [2001] 3 CLJ 933) is that the merits had not been
D dealt with in the Court of Appeal. Further, after leave had been granted on those cases, a preliminary objection had been raised at the appeal stage to establish the point that leave should not have
E been given. All three appeals had been dismissed with costs without going into the merits when this court upheld the preliminary objections. The situation is somewhat different here as both the High Court and the Court of Appeal had actually dealt with the matter on the merits. It was not simply a matter of a lack of jurisdiction. Further, no preliminary objection had been
F raised at the appeal stage before us against the granting of the leave.

- Despite that, in the light of the authorities, we would hold that we are not prevented from reconsidering the issue of leave again. Coming back to the questions formulated for determination by this court, it is our view that the questions do not involve a
G question of importance upon which further argument and a decision of this court would be to public advantage. The questions merely relate to the set of facts in the appeal and the application of the settled principles of law as is plain from the judgment of the Court of Appeal. As such, they do not come
H within the ambit of s. 96(a) of the CJA and, therefore, there is no necessity or purpose for this court to answer the questions posed regardless of the fact that leave to appeal has in fact been granted at an earlier hearing.

I

[6] The proposition that is supported by *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* is that it is open to a respondent to contend at the hearing of the merits of an appeal that leave ought not to have been granted in the first place. And it is then open to the panel hearing the appeal to so rule. In some of the cases the point was taken by way of a preliminary objection. In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* it was by way of argument during the merits hearing. In the present case it was taken by way of an amended motion. So, it really boils down to the procedure or form adopted in a given case. In the present instance there was full argument on the issue of whether leave was rightly granted. That is undisputed. There was therefore no procedural unfairness at all on that account. What the appellant complains is that its appeal was never heard. That, on the present state of the authorities, appears to be irrelevant. For, an appellant who has obtained leave must be prepared to defend the grant of leave at any subsequent stage.

[7] The extreme cases in which this court will act under r. 137 were summed up by my learned brother, the Chief Justice, in *Badan Peguam Malaysia v. Kerajaan Malaysia* [2009] 1 CLJ 833:

Before an application for review under r. 137 can succeed, the applicant must show on the face of the record that there was injustice. That error must be obvious on the face of the record. It should be able to be seen just by reading the record that there was an error which obviously was an injustice.

[8] What does the record show here? It shows that the applicant was called upon to defend the leave it had earlier obtained. That was done on the respondent's amended motion. There was full argument on the point. This court was obviously satisfied that leave ought not to have been granted. Hence it dismissed the appeal. That is not an injustice to the applicant.

[9] For the reasons already given I would dismiss the application with costs.

[10] My learned brothers, the Chief Justice and the Chief Judge of Malaya have read this judgment in draft and have expressed their agreement with it.